WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15, c. 43, s. 8;2010, c. 3, s. 5;2012, c. 1, s. 29.

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hilan, 2015 ONCA 338
DATE: 20150512
DOCKET: C57944

Simmons, Tulloch and Huscroft JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Racil Hilan

Appellant

Norman D. Boxall and Jon Doody, for the appellant

Roger Shallow, for the respondent

Heard and released orally: April 10, 2015

On appeal from the convictions entered on May 29, 2013 and the sentence imposed on November 19, 2013 by Justice H.L. Fraser of the Ontario Court of Justice.

ENDORSEMENT

[1] We reject the appellant's submissions that the trial judge erred by improperly rejecting the appellant's evidence as being illogical and by failing to assess the reliability of the complainant's evidence. We also reject the appellant's submission that the finding of guilt on the sexual assault charge was unreasonable.

[2] Although the complainant did not see the appellant's hand moving her skirt, her evidence concerning what she felt and how her skirt moved up her leg

created a compelling inference that the appellant touched her and moved her skirt while seated beside her on a bus. In our view, the appellant's complaints concerning the bases on which the trial judge rejected his evidence are no more than an expression of disagreement with the trial judge's reasons. The trial judge had the advantage of seeing and hearing the appellant testify. Reading his reasons as a whole, the trial judge provided an adequate explanation for rejecting the appellant's evidence.

[3] Further, while the trial judge did not specifically mention the word "reliability", his reasons reflect a finding that the complainant's evidence was reliable.

[4] The appeal from conviction for sexual assault is therefore dismissed. We reserve our decision concerning the appeal from conviction for mischief by interference with the complainant's lawful use and enjoyment of property pending receipt of written submissions.

[5] We agree with the appellant that a sentence of six months' imprisonment together with two years' probation for the sexual assault charge was wholly disproportionate to the conduct at issue. The appellant touched the complainant and raised her skirt while seated beside her on a public bus. Albeit on a promise to appear in relation to another offence at the time the sexual assault was committed, the appellant was sentenced as a first offender. Taking account of all

of the circumstances of the offence and this offender and, particularly in light of 13 days of pre-sentence custody, a jail sentence was not warranted.

[6] Leave to appeal sentence on the sexual assault conviction is granted, the sentence appeal concerning the sexual assault conviction is allowed and the sentence of imprisonment plus probation on the sexual assault conviction is varied to a suspended sentence plus two years' probation on the same terms as imposed by the trial judge. All other terms of the sentence imposed by the trial judge for the sexual assault conviction shall remain the same.

[7] The Crown does not dispute that if the sentence appeal on the sexual assault conviction is allowed, the concurrent sentence of two months' imprisonment imposed on the mischief conviction, which arose from the same facts, should also be allowed. For the same reasons, leave to appeal sentence on the mischief conviction is granted, the sentence appeal concerning the mischief conviction is allowed and the sentence of imprisonment is varied to a suspended sentence plus two years' probation on the same terms as imposed by the trial judge concurrent to the sentence on the sexual assault.

"Janet Simmons J.A."
"M. Tulloch J.A."
"Grant Huscroft J.A."